

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/1. Meanings of 'pawn', 'pawnor', 'pawnee' and 'pawnbroker'.

PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))

1. PAWNS AT COMMON LAW

(1) INTRODUCTION

1. Meanings of 'pawn', 'pawnor', 'pawnee' and 'pawnbroker'.

A 'pawn' or 'pledge'¹ is a bailment of personal property as a security for some debt or engagement².

A 'pawnor' is one who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability³. A 'pawnee' is one who receives a pawn or pledge⁴.

A 'pawnbroker' is one whose business is to lend money⁵, usually in small sums, upon pawn or pledge⁶. Since the repeal of the Pawnbrokers Act 1872, there is no longer a statutory definition of 'pawnbroker'⁷.

1 At common law, 'pawn' and 'pledge' were used interchangeably to denote both the bailment and the thing bailed, although there was the distinction in practice that 'pawn' was not used in respect of the pledging of bills of lading. The Consumer Credit Act 1974 has drawn a new distinction between the thing put to pawn and the rights of the pawnee in that thing, the former being distinguished by 'pawn' and the latter by 'pledge': see CONSUMER CREDIT vol 9(1) (Reissue) PARA 208. As to consumer credit legislation in relation to pawns and pledges see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208 et seq.

2 Story on Bailments (9th Edn) (1878) s 286. It is described by Holt CJ, in *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913, as the fourth sort of bailment 'when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor'. The different definitions are collected in *Donald v Suckling* (1866) LR 1 QB 585 at 594; see BAILMENT vol 3(1) (2005 Reissue) PARAS 2, 81. For the meaning of 'pledge' under the Factors Act 1889 see AGENCY vol 1 (2008) PARA 148.

3 3 Bouvier's Law Dictionary 2539. For the meaning of 'pawnor' in relation to pawns subject to the Consumer Credit Act 1974 see s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208.

4 3 Bouvier's Law Dictionary 2539. For the meaning of 'pawnee' for the purposes of the Consumer Credit Act 1974 see s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208.

5 As to the business of lending money subject to the Consumer Credit Act 1974 generally see PARA 41 post; and CONSUMER CREDIT.

6 3 Bouvier's Law Dictionary 2539.

7 As to the repeal of the Pawnbrokers Acts 1872 and 1960 see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 7.

UPDATE

1-8 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/2. Classes of pawns.

2. Classes of pawns.

There are two classes of pawn¹, namely: (1) those governed by statute²; and (2) all other cases. The statutory control is embodied in the Consumer Credit Act 1974³. In other cases, the contract of pawn is governed by the general law. The general law applies also to pawns governed by statute, unless expressly excluded by statute⁴.

1 For the meaning of 'pawn' see PARA 1 ante.

2 As to statutory control see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81.

3 For the relevant provisions of the Consumer Credit Act 1974 see PARA 41 post; and see generally CONSUMER CREDIT.

4 *Jones v Marshall* (1889) 24 QBD 269, DC.

UPDATE

1-8 Introduction

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Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/3. General characteristics of the contract of pawn.

3. General characteristics of the contract of pawn.

The contract of pawn or pledge is one of the five classes of bailment¹. It is distinguishable from a transaction of mortgage in two main ways². In the first place, it is essential to the contract of pawn that the property pledged should be actually or constructively³ delivered to the pawnee⁴, whereas on a mortgage the property passes by assignment, and possession by the mortgagee is not essential in every case⁵. Secondly, whereas on a legal mortgage⁶ of personal property the mortgagee acquires by assignment an absolute interest in the property subject to a right of

redemption, in pawn the pawnee has only a special property or a special interest⁷ in the pledge, while the general property in it remains in the pawnor⁸ and wholly reverts to him on discharge of the debt or engagement⁹.

Pawn has been described as a security where, by contract, a deposit of goods is made a security for a debt and the right to the property vests in the pawnee so far as is necessary to secure the debt; in this sense, it is intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed¹⁰.

Pawn does not amount to an equitable mortgage¹¹, or to a bill of sale¹².

The identity of pledge as a form of bailment carries other general implications. The pawnee is a fiduciary and holds the surplus proceeds of any sale of the chattel on trust for the pawnor and is bound to pay such surplus to the pawnor without the need for the pawnor to make a demand for payment¹³. The pawnee must take reasonable care of the goods¹⁴ and may be answerable to a guarantor of the debt, as well as the pawnor, if through lack of care the security is lost or impaired¹⁵.

1 See BAILMENT vol 3(1) (2005 Reissue) PARA 2. There is no requirement that the agreement be made or evidenced in writing save for the statutory requirements as to credit agreements and pawn-receipts in the case of agreements to which the Consumer Credit Act 1974 applies (see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 160 et seq, 210-211). For the meanings of 'pawn' and 'pledge' see PARA 1 ante.

2 As to mortgage generally see MORTGAGE vol 77 (2010) PARA 101 et seq.

3 See eg *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC.

4 For the meaning of 'pawnee' see PARA 1 ante.

4 *Ryall v Rowles* (1750) 1 Atk 165 at 166; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA, per Cotton LJ, and at 234 per Fry LJ. For the meaning of 'pawnee' see PARA 1 ante.

6 Pawn does not amount to an equitable mortgage of an interest in personal property: see the text and note 11 infra.

7 *Donald v Suckling* (1866) LR 1 QB 585; *Burdick v Sewell* (1883) 10 QBD 363 at 367 (affd *Sewell v Burdick* (1884) 10 App Cas 74, HL). As to the special property or special interest see further PARA 22 post. See also *Halliday v Holgate* (1868) LR 3 Exch 299 at 302, Ex Ch. Although the pawnee may sell he has no right to acquire the property in the goods himself by means of foreclosure: see *Carter v Wake* (1877) 4 ChD 605 at 606.

8 For the meaning of 'pawnor' see PARA 1 ante.

9 *Ryall v Rowles* (1750) 1 Atk 165; *Jones v Smith* (1794) 2 Ves 372; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Fraser v Byas* (1895) 11 TLR 481; *George Attenborough & Son v Solomon* [1913] AC 76 at 84, HL, per Viscount Haldane LC.

10 *Halliday v Holgate* (1868) LR 3 Exch 299 at 302, Ex Ch, per Willes J. As to the difference between pawn and lien see PARA 4 post.

11 *Carter v Wake* (1877) 4 ChD 605; *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396 at 403, CA, per Fry LJ. For the law relating to an equitable mortgage or charge of an interest in personal property see MORTGAGE vol 77 (2010) PARA 139 et seq.

12 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690, CA; *Waight v Waight and Walker* [1952] P 282, [1952] 2 All ER 290. As to the avoidance of bills of sale by way of security unless in the statutory form or unless certain other conditions are fulfilled see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1818 et seq. The bills of sale legislation affects documents, but not oral transactions: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1639.

13 See *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455. See also the Consumer Credit Act 1974 s 121(3); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 217.

14 *Giles v Carter* (1965) 109 Sol Jo 452.

15 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA.

UPDATE

1-8 Introduction

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/4. Difference between pawn and lien.

4. Difference between pawn and lien.

The rights of the pawnee¹ in the thing pawned are distinguishable from a common law lien² in that he acquires a special property or special interest³ in the property pawned, whereas a person exercising a lien has only a right to detain the subject matter of the lien until he is paid⁴, and a lien is not transferable to a third person⁵.

1 For the meaning of 'pawnee' see PARA 1 ante.

2 As to lien generally see LIEN.

3 As to the special property or special interest see PARA 22 post. In respect of regulated consumer credit agreements, the Consumer Credit Act 1974 specifically recognises that the interests of both the pawnee and the pawnor may be passed by assignment or operation of law: see s 189(1); and PARA 1 ante.

4 *Yungmann v Briesemann* (1892) 67 LT 642, CA; and see *Gladstone v Birley* (1817) 2 Mer 401. As to the nature of lien see LIEN vol 68 (2008) PARA 820.

5 *Donald v Suckling* (1866) LR 1 QB 585 at 612 per Blackburn J.

UPDATE

1-8 Introduction

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Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/5. Things capable of being pawned.

5. Things capable of being pawned.

The subject matter of the contract of pawn¹ usually consists of goods and chattels capable of actual or constructive delivery², but other forms of personal property, including negotiable instruments, may be the subject of the contract where they can be identified³.

1 For the meaning of 'pawn' see PARA 1 ante.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909. As to what constitutes delivery see PARA 13 post.

3 The following cases serve as illustrations: *Taylor v Chester* (1869) LR 4 QB 309 (half a £50 note); *Lockwood v Ewer (or Lady Child v Chanstilet)* (1742) 9 Mod Rep 275 (East India stock); *Donald v Suckling* (1866) LR 1 QB 585 (debentures); *Langton v Waite* (1868) LR 6 Eq 165 (railway stock); *Halliday v Holgate* (1868) LR 3 Exch 299, Ex Ch (scrip certificates). As to an injunction to restrain an unlawful pledge of negotiable instruments see CIVIL PROCEDURE vol 11 (2009) PARA 478. The Consumer Credit Act 1974 ss 114-122 (ss 114, 118, 119 and 120 all as amended) do not apply to a pledge of documents of title or of bearer bonds or to a non-commercial agreement or to exempt agreements: see PARA 41 post. Where compensation is paid under the Compensation (Defence) Act 1939 in respect of property which is subject to a pledge, the sum paid is deemed to be comprised in the pledge: Compensation (Defence) Act 1939 s 14(1) (numbered as such by the Statute Law (Repeals) Act 1989). This provision is not confined to cases where the owner is the pledgor; but see *Earl of Radnor v Folkestone Pier and Lift Co* [1950] 2 All ER 690, where such a restriction was assumed.

UPDATE

1-8 Introduction

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Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/6. Unlawful contracts of pawn.

6. Unlawful contracts of pawn.

By statute, contracts of pawn¹ relating to the following kinds of property have been made unlawful²: (1) military, air force and naval equipment³; (2) any document issued by or on behalf of the Secretary of State⁴ in connection with any benefit, pension or allowance⁵; and (3) firearms or ammunition⁶.

1 For the meaning of 'pawn' see PARA 1 ante.

2 As to offences by persons carrying on consumer credit businesses see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 210, 218.

3 See the Army Act 1955 s 46 (as substituted), ss 195, 196, 211 (all as amended); the Air Force Act 1955 s 46 (as substituted), ss 195, 196, 210 (all as amended); the Naval Discipline Act 1957 ss 31, 98, 99 (ss 98, 99 both as amended); and ARMED FORCES. As to the avoidance of purported assignments of or charges on military pay, awards, grants, pensions or allowances see the Army Act 1955 s 203; the Air Force Act 1955 s 203; and ARMED FORCES vol 2(2) (Reissue) PARAS 218, 271. For restrictions in respect of pensions see CHOSSES IN ACTION vol 13 (2009) PARA 94 et seq.

4 le the Secretary of State for Work and Pensions: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 1.

5 See the Social Security Administration Act 1992 s 182(1)(a) (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 404.

6 The Firearms Act 1968 makes it an offence for a pawnbroker to take in pawn any firearm or ammunition to which s 1 (as amended) applies (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 634) or a shot gun: s 3(6). A pawnbroker acting in contravention of s 3(6) is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or to both: s 51(1), Sch 6 Pt I (Sch 6 Pt I amended by, or by virtue of, the Criminal Justice Act 1972 s 28(1)-(4); the Magistrates' Courts Act 1980 s 32(2); the Criminal Justice Act 1982 ss 38, 46; the Criminal Justice Act 1988 s 44; the Firearms (Amendment) Act 1988 ss 13(5), 23(7); the Criminal Justice and Public Order Act 1994 s 157(3), (5) (a), Sch 8 Pt III; the Firearms (Amendment) Act 1994 ss 1(2), 2(3); the Firearms (Amendment) Act 1997 ss 43(3), 52, Sch 2 paras 1, 4(2), 14, Sch 3; the Anti-social Behaviour Act 2003 ss 37(2), 38(1), (5), 92, Sch 3; and the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, regs 3(6), 4(4), 5(3), 6(3), 7(5)). The Firearms Act 1968 does not define 'pawnbroker', and since the repeal of the Pawnbrokers Acts 1872 to 1960 there is no longer any statutory definition of 'pawnbroker'; but for a definition see PARA 1 ante. 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

It is also an offence to take in pawn small arms where their barrels are marked with any forged or counterfeit stamp, or with any part of any such stamp: see the Gun Barrel Proof Act 1868 s 121(5) (amended by the Gun Barrel Proof Act 1978 s 8(1), Sch 3 para 10(1), (2)); and the Gun Barrel Proof Act 1868 s 122(2) (amended by the Gun Barrel Proof Act 1978 s 8(2), Sch 3 para 11, Sch 4). Furthermore, every person who takes in pawn small arms where their barrels are not duly proved and marked commits an offence: see the Gun Barrel Proof Act 1868 s 122(5) (amended by the Gun Barrel Proof Act 1978 Sch 3 para 11, Sch 4).

UPDATE

1-8 Introduction

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6 Unlawful contracts of pawn

NOTE 3--Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957 replaced: Armed Forces Act 2006.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/7. Unlawful discrimination by pawnee.

7. Unlawful discrimination by pawnee.

It is unlawful¹ for any person concerned with the provision of facilities or services to the public or a section of the public to discriminate² against a person on the grounds of his sex or race³,

on the grounds that he is a disabled person⁴, or on the grounds of his religion or belief⁵ or his sexual orientation⁶. For these purposes, facilities and services include facilities for loans, credit or finance⁷.

1 Unlawful discrimination may be made the subject of civil proceedings: see the Sex Discrimination Act 1975 s 66(1); the Race Relations Act 1976 s 57(1); the Disability Discrimination Act 1995 s 25(1); and the Equality Act 2006 s 66.

2 Discrimination in relation to a person's sex or race may take the form of a refusal or deliberate omission to provide the service or facility, or a refusal or deliberate omission to provide facilities of like quality, in the like manner and on like terms as are normal for other members of the public: see the Sex Discrimination Act 1975 s 29(1)(a), (b); and the Race Relations Act 1976 s 20(1)(a), (b). Discrimination against a disabled person may take the form of a refusal or deliberate omission to provide any service, or to provide it on the same terms or in the same manner as to other members of the public; and failure to comply with any duty imposed to make reasonable adjustments so as to make services available to disabled people: see the Disability Discrimination Act 1995 s 19(1), (2). Discrimination on the grounds of a person's religion or belief or his sexual orientation may take the form of a refusal to provide facilities or services, or a refusal to provide facilities or services of a like quality, in a like manner or on like terms as are normal for other members of the public or a section of the public to which the person belongs: see the Equality Act 2006 s 46(1); and the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, reg 4(1).

3 See the Sex Discrimination Act 1975 ss 2, 29(1); the Race Relations Act 1976 s 20(1); and DISCRIMINATION vol 13 (2007 Reissue) PARAS 357, 382.

4 See the Disability Discrimination Act 1995 s 19(1); and DISCRIMINATION vol 13 (2007 Reissue) PARA 461.

5 See the Equality Act 2006 s 46; and DISCRIMINATION vol 13 (2007 Reissue) PARA 583 et seq.

6 See the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, reg 4(1); and DISCRIMINATION vol 13 (2007 Reissue) PARA 753.

7 See the Sex Discrimination Act 1975 s 29(2)(c); the Race Relations Act 1975 s 20(2)(c); the Disability Discrimination Act 1995 s 19(3)(e); the Equality Act 2006 s 46(2)(c); and the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, reg 4(2).

UPDATE

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Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(1) INTRODUCTION/8. Pawns by persons under a disability.

8. Pawns by persons under a disability.

The Infants Relief Act 1874 provided that a contract, whether by specialty or by simple contract¹, entered into by a minor for the repayment of money lent or to be lent was absolutely void². However, the Minors' Contracts Act 1987 disapplied the Infants Relief Act 1874³, so that contracts made by a minor after 9 June 1987⁴ again become subject to the rules of common law governing contracts with children⁵. The Infants Relief Act 1874 seemed to have made it

impossible for a minor to make a valid contract of pawn⁶, and if any such contract was made the pawnee could neither recover the principal nor sue for interest, unless perhaps the loan was to provide necessities⁷.

A contract of pawn made by a drunken person follows the ordinary law of contract⁸. The capacity of a person suffering from mental disorder to enter into a binding contract is discussed elsewhere in this work⁹.

- 1 See CONTRACT vol 9(1) (Reissue) PARA 615 et seq.
- 2 See the Infants Relief Act 1874 s 1 (repealed); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14.
- 3 See the Minors' Contracts Act 1987 s 1(a).
- 4 See the date on which ibid s 1 came into force: s 5(2).
- 5 As to the common law rules governing contracts with children see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.
- 6 For the meanings of 'pawn' and 'pawnee' see PARA 1 ante.
- 7 There is no direct authority on this point, but see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 18-19. In respect of regulated agreements under the Consumer Credit Act 1974, a person who takes any article in pawn from an individual whom he knows to be, or who appears to be and is, a minor commits an offence: see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 210.
- 8 See CONTRACT vol 9(1) (Reissue) PARA 717.
- 9 See MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

UPDATE

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Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/9. Who may pawn at common law.

(2) THE CONTRACT OF PLEDGE OR PAWN

9. Who may pawn at common law.

At common law the capacity of a person to enter into a contract of pawn is governed by the same rules as are applicable to contracts in general¹.

¹ See CONTRACT vol 9(1) (Reissue) PARA 630. As to pawns by persons under disability see PARA 8 ante. For the meaning of 'pawn' see PARA 1 ante. As to the capacity of an executor to pledge his testator's assets see *George Attenborough & Son v Solomon* [1913] AC 76, HL; and TRUSTS vol 48 (2007 Reissue) PARA 602.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/10. Mercantile agents or factors.

10. Mercantile agents or factors.

The capacity of mercantile agents¹ or factors to enter into a contract of pawn is regulated by statute². At common law, a mercantile agent cannot bind his principal to a contract of pawn without the principal's authority³.

Where, with the owner's consent, a mercantile agent is in possession⁴ of goods⁵ or of the documents of title⁶ to goods, any pledge⁷ of the goods made by him when acting in the ordinary course of business of a mercantile agent is as valid as if he were expressly authorised by the owner of the goods to make the pledge, provided that the pledgee acts in good faith and has no notice at the time of the pledge that the agent has no authority to make it⁸.

The statutory authority of a mercantile agent to pledge exists notwithstanding the usage of a particular trade that such an agent has no authority to pledge goods entrusted to him for sale⁹, and the same principle applies to a mercantile agent who is entrusted with goods for sale on the terms of sale or return¹⁰.

¹ For the meaning of 'mercantile agent', and as to agreements with his clerk or other authorised person, see AGENCY vol 1 (2008) PARAS 12, 148.

² See the Factors Act 1889; and AGENCY vol 1 (2008) PARA 148. For the meaning of 'pawn' see PARA 1 ante.

³ *Fuentes v Montis* (1868) LR 3 CP 268 at 277 per Willes J (on appeal LR 4 CP 93, Ex Ch); *Cole v North Western Bank* (1875) LR 10 CP 354 at 363, Ex Ch, per Blackburn J; *City Bank v Barrow* (1880) 5 App Cas 664, HL; *Farquharson Bros & Co v King & Co* [1902] AC 325, HL. See also AGENCY vol 1 (2008) PARAS 12, 43, 141 et seq.

⁴ As to the effect of obtaining possession by fraud and of revocation of consent see AGENCY vol 1 (2008) PARA 148.

⁵ 'Goods' includes wares and merchandise (see the Factors Act 1889 s 1(3)) and household furniture (see *Lee v Butler* [1893] 2 QB 318 at 321, CA).

⁶ For the meaning of 'documents of title' see AGENCY vol 1 (2008) PARA 148. As to documents of title given by a mercantile agent see AGENCY vol 1 (2008) PARA 149.

⁷ For the meaning of 'pledge' for the purposes of the Factors Act 1889 see AGENCY vol 1 (2008) PARA 148. Goods entrusted by a mercantile agent to an auctioneer for sale are not thereby dealt with by way of pledge even when the auctioneer before sale makes advances upon them to him: *Waddington & Sons v Neale & Sons* (1907) 96 LT 786; and see *Biggs v Evans* [1894] 1 QB 88. As to auction generally see AUCTION.

⁸ Factors Act 1889 s 2(1). See also *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA; *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd* [1937] 1 All ER 799; and AGENCY vol 1 (2008) PARAS 148-149.

⁹ *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA. See also *Janesich v George Attenborough & Son* (1910) 26 TLR 278. By asking a friend to pledge goods entrusted to him for sale, a mercantile agent is not pledging goods in the ordinary course of his business as a mercantile agent: *De Gorter v Attenborough & Son* (1904) 21 TLR 19.

¹⁰ *Weiner v Harris* [1910] 1 KB 285, CA.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/11. Pledges by sellers and buyers of goods.

11. Pledges by sellers and buyers of goods.

Where a seller of goods is in possession of them after the sale and delivers them under a pledge, the pledge has effect, if the goods are received in good faith and without notice of the sale, as if the owner of the goods had expressly authorised their delivery¹. Protection is similarly afforded where a buyer, having bought or agreed to buy goods, obtains possession of them with the seller's consent and delivers them under a pledge². This protection extends to pledges effected by a mercantile agent³ acting for the seller or buyer of goods who has continued in possession of the goods, or who has bought or agreed to buy them⁴.

1 See the Factors Act 1889 s 8; and the Sale of Goods Act 1979 s 24. See further AGENCY vol 1 (2008) PARAS 145, 165; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 157. For the meaning of 'pledge' see PARA 1 ante. These provisions extend to documents of title to goods as well as to the goods themselves, and to other dispositions as well as to pledges. The provisions of the Sale of Goods Act 1979 relating to contracts of sale do not apply to any transactions in the form of a contract of sale which is intended to operate by way of pledge: see s 62(4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 8. A mere written agreement to pledge unaccompanied by actual or constructive delivery may not be exempt from the requirement of the Sale of Goods Act 1979 if such a transaction is to have effect as a result of the documents only: see *Dublin City Distillery (Great Brunswick Street, Dublin) Ltd v Doherty* [1914] AC 823 at 848, HL.

2 See the Factors Act 1889 s 9; and the Sale of Goods Act 1979 s 25(1). A buyer under a conditional sale agreement is not a buyer or someone who has agreed to buy for the purposes of both the Factors Act 1889 s 9 and the Sale of Goods Act s 25(1): see the Factors Act 1889 s 9(i) (as added); and the Sale of Goods Act 1979 s 25(2)(a). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 158. For the relevant provisions as to ordinary hire purchase agreements see CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq. As to the effect of dispositions by a buyer on the rights of an unpaid seller, and as to the rights of a pledgee as against an unpaid seller see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 236 et seq.

3 For the meaning of 'mercantile agent' see AGENCY vol 1 (2008) PARA 12.

4 See the Factors Act 1889 ss 8, 9; and the Sale of Goods Act 1979 ss 24, 25.

UPDATE

11 Pledges by sellers and buyers of goods

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/12. Proof of property.

12. Proof of property.

Subject to the provisions relating to mercantile agents¹, mere possession by a pawnor² is not sufficient proof of property in the thing pawned against the real owner³.

If the pawnor has no authority to make the pledge, the pawnee cannot hold the goods pledged against the real owner⁴, unless the owner has so acted as to clothe the pawnor with apparent

authority to make the pledge⁵. An authority to an agent to sell does not extend by implication to a pledge so as to give the pawnee a good title as against the real owner⁶.

1 See PARAS 10-11 ante.

2 For the meanings of 'pawnor' and 'pawnee' see PARA 1 ante.

3 *Hoare v Parker* (1788) 2 Term Rep 376; *Kingsford v Merry* (1856) 1 H & N 503 at 516, Ex Ch. As to the rights of the true owner where the goods pawned have been pawned without his authority see PARA 35 et seq post.

4 *Williams v Barton* (1825) 3 Bing 139, Ex Ch. See also *Advanced Industrial Technology Corpn Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923, [2006] All ER (D) 21 (Jul).

5 *Cole v North Western Bank* (1875) LR 10 CP 354 at 363, Ex Ch, per Blackburn J; *Henderson & Co v Williams* [1895] 1 QB 521, CA; *Fry and Mason v Smellie and Taylor* [1912] 3 KB 282, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168. See further AGENCY vol 1 (2008) PARA 145; ESTOPPEL vol 16(2) (Reissue) PARA 1058 et seq.

6 *City Bank v Barrow* (1880) 5 App Cas 664 at 669-670, HL.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/13. Delivery of chattel pawned.

13. Delivery of chattel pawned.

A contract to pawn a chattel, even though money is advanced on the faith of it, is not sufficient in itself to pass any special property or interest in the chattel to the pawnee¹. Delivery of the chattel pawned in consideration of the debt or advance is a necessary element in the making of a contract of pawn². This delivery may be actual, in the sense of physical delivery of the chattel, or constructive in the sense that, although the chattel is legally delivered, it does not actually pass from the hands of the pawnor to those of the pawnee³.

Constructive delivery may be effected even where the chattel remains in the possession of the pawnor for a special purpose⁴. It may be effected by some symbolic act such as the delivery of a key of a warehouse in which goods are stored⁵ or of the key of a room in which a collection is stored⁶. Where the chattel is in the custody of a third person, such as a warehouseman, who holds for the owner so that in law his possession is that of the owner, constructive delivery may be effected by an order from the owner to the third person to hold the chattel for the pawnee, which must be perfected by an acknowledgment by the third person that he holds the chattel for the pawnee⁷. The delivery to and receipt by a transferee of a document of title to goods, other than a bill of lading⁸, does not at common law⁹ amount to delivery and receipt of the goods¹⁰.

1 *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 843, HL, where earlier decisions on constructive delivery are reviewed by Lord Atkinson. As to special property or interest see PARA 22 post. For the meanings of 'pawn', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Martin v Reid* (1862) 11 CBNS 730 at 734 per Erle CJ; *Ayers v South Australian Banking Co* (1871) LR 3 PC 548 at 554.

3 *Martin v Reid* (1862) 11 CBNS 730; *Meyerstein v Barber* (1866) LR 2 CP 38 at 52. For a summary of the common law see *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at 58, PC.

4 *Reeves v Capper* (1838) 5 Bing NC 136.

5 *Young v Lambert* (1870) LR 3 PC 142.

6 *Hilton v Tucker* (1888) 39 ChD 669; and see *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807, where goods were held in rooms on the pledgor's premises, and the key delivered to the pledgee with an irrevocable licence to remove the goods as desired. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1254.

7 *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC; and see *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504.

8 A transfer of a bill of lading operates to pass the property in the goods specified in it in accordance with the intention of the parties; see *Sewell v Burdick* (1884) 10 App Cas 74, HL; *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, CA; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 315.

9 For the exception made by the Factors Act 1889 see s 3; and AGENCY vol 1 (2008) PARA 148.

10 *Farina v Home* (1846) 16 M & W 119; *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 848, HL; *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at 58, PC. In *Grigg v National Guardian Assurance Co* [1891] 3 Ch 206, the delivery order was given by the pawnor direct to the warehouseman.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/14. When advance and delivery are not simultaneous.

14. When advance and delivery are not simultaneous.

The delivery of a chattel must be in pursuance of the contract, but the advance and delivery need not be contemporaneous. Thus a pledge¹ may be perfected by delivery after the advance has been made²; and where goods are delivered for appraisal with a view to making an advance on the security of the goods, there is a good delivery for the purpose of making a pledge whenever that pledge should be created³. When the advance is made before possession is given, the intended pawnee⁴ has only a right of action on the contract and no interest in the thing pawned⁵.

1 For the meaning of 'pledge' see PARA 1 ante.

2 *Hilton v Tucker* (1888) 39 ChD 669.

3 *Blundell-Leigh v Attenborough* [1921] 3 KB 235, CA.

4 For the meaning of 'pawnee' see PARA 1 ante.

5 *Howes v Ball* (1827) 7 B & C 481; *Donald v Suckling* (1866) LR 1 QB 585 at 613.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (2) THE CONTRACT OF PLEDGE OR PAWN/15. Extinction of contract of pawn.

15. Extinction of contract of pawn.

The contract of pawn¹ is extinguished by the satisfaction of the debt or engagement and the redelivery of the property pledged to the pawnor, since there is an implied undertaking on the pawnee's part to redeliver the property to the pawnor on payment by the pawnor of the sum advanced with interest². The essence of this extinction of the contract lies in the pawnee being divested wholly of his special property or interest and possession in the property pledged³. However, the pawnee has the right to hand back to the pawnor the property pledged for a special purpose without affecting his security and without extinguishing the contract⁴.

1 For the meanings of 'pawn', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Singer Manufacturing Co v Clark* (1879) 5 Ex D 37. For an unusual case see *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504, where it was held that a delivery by a pledgee in constructive possession of goods to a purchaser of the goods of a delivery note in favour of the purchaser does not involve an undertaking by the pledgee that the goods will be delivered pursuant to the order. Delivery of such an order relieves the pledgee from his constructive possession of the goods, and he is not, without more, liable for their subsequent detention by the actual holder of the goods.

3 See *Babcock v Lawson* (1880) 5 QBD 284, CA. As to the pawnor's remedies on the pawnee's failure to redeliver see PARA 21 post. As to special property or interest see PARA 22 post.

4 *North Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56, HL, where the pawnee returned a bill of lading to the pawnor, making the pawnor his agent to sell the goods comprised in it (distinguishing *Tod & Son v Merchant Banking Co of London* (1883) 10 R 1009, Ct of Sess); *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA. The general practice of banks in releasing documents pledged with them to facilitate the realisation of assets without prejudice to their rights as pledgees was approved in *Re David Allester Ltd* [1922] 2 Ch 211: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 986. However, the bank may be unable to recover the documents if a third person has acquired a valid title to them under the Factors Act 1889: *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* supra.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/16. Implied warranty of title.

(3) WARRANTIES AND RIGHTS OF PAWNOR

16. Implied warranty of title.

At common law there is an implied undertaking on the part of the pawnor¹ that the property pawned is his own, or that he has the authority of the owner to pawn it, and that it may be safely delivered back to him².

1 For the meanings of 'pawn' and 'pawnor' see PARA 1 ante.

2 *Singer Manufacturing Co v Clark* (1879) 5 Ex D 37 at 42 per curiam; *Cheesman v Exall* (1851) 6 Exch 341. See also *Advanced Industrial Technology Corp Ltd v Bond Street Jewellers Ltd* [2006] EWCA Civ 923, [2006] All ER (D) 21 (Jul), in which it was held that a false representation created by non-disclosure by the pawnor that he did not have the authority of the owner of the goods to pawn them could be sued upon by the pawnee quite independently of the warranty envisaged in *Singer Manufacturing Co v Clark* supra. As to dishonest pawning see PARA 36 post; and as to pawned goods obtained by misrepresentation see PARA 37 post.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/17. Warranties as to quality.

17. Warranties as to quality.

Generally a pawnor¹ does not warrant the quality of the property pawned. However, if he makes a false and fraudulent representation as to quality for the purpose of obtaining property by it from the pawnee, the pawnor may be guilty of an offence².

1 For the meanings of 'pawn', 'pawnor' and 'pawnee' see PARA 1 ante.

² See *R v Roebuck* (1856) Dears & B 24, CCR; *R v Ardley* (1871) LR 1 CCR 301; *R v Francis* (1874) LR 2 CCR 128. Under the Fraud Act 2006 the offence is that of fraud by false representation, but there must be an intention to make a gain for himself or another, or to cause loss to the pawnee or to expose him to a risk of loss: see ss 1, 2(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 309.

UPDATE

17 Warranties as to quality

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/18. Sale by pawnor before redemption.

18. Sale by pawnor before redemption.

Before redemption a pawnor¹ may sell the thing pledged; and after such a sale the purchaser has the same interest in the thing as the pawnor had².

¹ For the meaning of 'pawnor' see PARA 1 ante.

² *Franklin v Neate* (1844) 13 M & W 481.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/19. The right to redeem.

19. The right to redeem.

A pawnor¹ has an absolute common law right to redeem the thing pawned upon tender of the amount advanced, since the general property in it remains in him². In the absence of any agreement as to time for payment he may redeem at any time during his life³, and upon the pawnee's death this right continues against the pawnee's personal representatives⁴. The right to redeem necessarily depends upon tender of the debt by the pawnor to the pawnee⁵, and it is lost if the pawnee has lawfully sold the subject of the pawn⁶. The right to redeem a pawn is not barred by any statute of limitation during the pawnor's lifetime⁷.

¹ For the meanings of 'pawn', 'pawnee' and 'pawnor' see PARA 1 ante.

² As to the provisions relating to the redemption of pledges under the Consumer Credit Act 1974 see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 212-213. The principle of consolidation of securities (as to which see MORTGAGE vol 77 (2010) PARA 498 et seq) does not apply to a contract of pawn: *Vanderzee v Willis* (1789) 3 Bro CC 21 (not available as against personal representatives of deceased pawnor), disapproving *Demandray v Metcalf* (1715) Prec Ch 419.

³ *Sir John Ratcliff v Davis* (1610) Yelv 178, where it was held that the right to redeem was personal to the pawnor and that it was extinguished on his death and did not pass to his executor. The rule was expressly disapproved of in New York in *Cortelyou v Lansing* (1805) 2 Caines Cas Err 200; and it seems inconsistent with the statutory rule that in the case of the death of a person on or after 25 July 1934 all causes of action vested in him survive for the benefit of his estate: see the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1); and

EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 814. For agreements to which the Consumer Credit Act 1974 applies, the statutory definition of 'pawnor' would include personal representatives: see PARA 1 ante.

4 *Sir John Ratcliff v Davis* (1610) Yelv 178; Bac Abr, Bailment (B).

5 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 917.

6 See PARAS 27-28 post.

7 *Kemp v Westbrook* (1749) 1 Ves Sen 278. A time may be fixed for redemption upon the expiration of which, in the absence of redemption, the pawnee has a power of sale: see further PARAS 27-28 post; and LIMITATION PERIODS vol 68 (2008) PARA 1129. As to the time for redemption and power of sale see the Consumer Credit Act 1974 ss 116, 120-121 (s 120 as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 212-213, 216.

UPDATE

19 The right to redeem

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/20. Partners' right to redeem.

20. Partners' right to redeem.

When goods are pawned¹ by several partners jointly, the right to redeem lies in them jointly and not severally. Any partner acting for the firm may redeem but all must join if an action is brought to recover the thing pawned².

1 For the meaning of 'pawn' see PARA 1 ante.

2 *Harper v Godsell* (1870) LR 5 QB 422. As to the rights of partners generally see PARTNERSHIP.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(3) WARRANTIES AND RIGHTS OF PAWNOR/21. Action for recovery by pawnor.

21. Action for recovery by pawnor.

A pawnor¹ cannot maintain an action for conversion² against a pawnee for the pledge unless the pawnor has a right to its immediate possession³; consequently until tender or payment of the debt the pawnor cannot generally maintain an action for conversion of the pledge⁴. A pawnor may sue a pawnee who refuses to restore the pledge after tender of the debt⁵; but, if the ownership of the pledge is in doubt, the refusal, if made reasonably and to obtain a reasonable time for the purposes of investigation, will not ground such an action⁶. In similar

circumstances the assignee of a pawnor may bring an action for conversion⁷, and may recover damages for non-delivery⁸.

If the pawnee unlawfully deals with the pledge⁹, as by sale, transfer or repledge, the contract of pawn is not thereby determined and the pawnor may not recover in conversion unless he has a right to immediate possession by redeeming the pledge¹⁰. However, if the pawnee deals with the pledge in a manner other than that which the law allows, and, for example by purporting to dispose of a greater interest than he has in the pledge, makes it difficult for the pawnor to redeem it, then, if any real damage has been caused to the pawnor, the pawnee has committed a legal wrong against him¹¹.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 Conversion is the dealing with goods in a manner inconsistent with the owner's rights, coupled with an intention to deny that person's right to them, or to assert a right inconsistent with it. The relief available where goods are detained includes an order for delivery or an order for damages, or a choice between the two: see the Torts (Interference with Goods) Act 1977 s 3(2); and see also *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314, [1963] 1 WLR 644, CA. See further TORT vol 45(2) (Reissue) PARA 542 et seq. The measure of damages is generally the market value of the goods concerned: see eg *J and E Hall Ltd v Barclay* [1937] 3 All ER 620 at 623, CA, per Greer LJ; and DAMAGES vol 12(1) (Reissue) PARA 861. As to the measure of damages where the claimant has a limited interest only see PARA 38 post.

3 *Halliday v Holgate* (1868) LR 3 Exch 299; *Donald v Suckling* (1866) LR 1 QB 585. See also *Wilson v Robertsons (London) Ltd* [2006] EWCA Civ 1088, 150 Sol Jo LB 1019, [2006] All ER (D) 410 (Jul); *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, [2003] 2 All ER (Comm) 491, [2003] 4 All ER 97. As to the pawnee's right to possession see PARA 23 post.

4 As to the pawnor's right to redeem see PARA 19 ante.

5 *Anon* (1693) 2 Salk 522; *Coggs v Bernard* (1703) 2 Ld Raym 909 at 917; *Donald v Suckling* (1866) LR 1 QB 585 at 610; *Yungmann v Briesemann* (1892) 67 LT 642, CA; and see *Pigot v Cubley* (1864) 15 CBNS 701.

6 *Vaughan v Watt* (1840) 6 M & W 492; and see *Clayton v Le Roy* [1911] 2 KB 1031 at 1051, CA. As to a pawnee's refusal to deliver the pawn under the Consumer Credit Act 1974 where the ownership is in doubt see s 117(2); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 213.

7 *Franklin v Neate* (1844) 13 M & W 481.

8 *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, CA.

9 A pawnee can without the previous consent of the pawnor repledge the goods (and so transmit his interest to a third party) for an amount not exceeding the original debt, unless that power is expressly excluded by the parties: *Mores v Conham* (1610) Owen 123 at 124.

10 *Donald v Suckling* (1866) LR 1 QB 585 at 610, 616, 618 (repledge for sum greater than that owed by pawnor), explaining *Johnson (Assignee of Cumming) v Stear* (1863) 15 CBNS 330; *Halliday v Holgate* (1868) LR 3 Exch 299, Ex Ch. The unlawful action of the pawnee may be sufficient to put the contract at an end where the pawnor has a special personal confidence in the pawnee and therefore stipulates that the pledge be kept by him alone: see *Donald v Suckling* supra at 615 per Blackburn J. In *Pigot v Cubley* (1864) 15 CBNS 701, it was held that the pawnor could sue on an unlawful sale by the pawnee, but in that case the amount of the debt was tendered after the sale, and the decision may perhaps be supported on the ground that there was an agreement not to sell until a certain time. As to the exercise of a power of sale see PARA 28 post.

11 *Halliday v Holgate* (1868) LR 3 Exch 299 at 302, Ex Ch; and see *Donald v Suckling* (1866) LR 1 QB 585 at 611-612 (tort), and at 618 (breach of contract).

UPDATE

21 Action for recovery by pawnor

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements

mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/22. Special property of the pawnee.

(4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE

22. Special property of the pawnee.

A pawnee¹ has a special property or special interest² in the pledge, whereas the general property in it continues in the owner³. That special property or interest exists so that the pawnee can compel payment of the debt⁴, or can sell the goods when the right to do so arises⁵. This special property or interest is to be distinguished from the mere right of detention which the holder of a lien possesses⁶, in that it is transferable in the sense that a pawnee may assign or pledge his special property or interest⁷ in the goods or may, as agent of the pawnor, in due course, sell the goods, whereas the unauthorised transfer of the subject matter of a lien does not transfer the right of the holder of the lien⁸. This special property or interest does not arise until possession is given to the pawnee⁹. If during the contract there is any increase in the value of the security, the pawnee is entitled to that increase as part of his security¹⁰.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 In *The Odessa* [1916] 1 AC 145 at 158-159, PC, the Judicial Committee criticised the use of the term 'special property' on the ground that, when the pawnee's right to sell (see PARAS 27-28 post) is examined, the so-called 'special property' which that right is said to create is in truth no property at all. The use of the expression 'special interest' was preferred.

3 *Sir John Ratcliff v Davis* (1610) Yelv 178; *Harper v Godsell* (1870) LR 5 QB 422; and see PARAS 3, 12 ante. A pawnee has an insurable interest in the goods, and both pawnee and pawnor may have a proprietary interest in the proceeds of any claim enforced by the other: Paton's Bailment in the Common Law (1952); and see INSURANCE vol 25 (2003 Reissue) PARA 698.

4 *Coggs v Bernard* (1703) 2 Ld Raym 909. As to the right of action for debt see PARA 29 post.

5 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 698, CA, per Bowen LJ. As to the power of sale see PARA 27 post.

6 As to lien generally see LIEN.

7 *Donald v Suckling* (1866) LR 1 QB 585 at 614 per Blackburn J; and see PARA 24 post.

8 *Donald v Suckling* (1866) LR 1 QB 585 at 612 per Blackburn J; and see *Treuttel v Barandon* (1817) 8 Taunt 100. However, see *The Odessa* [1916] 1 AC 145 at 159, PC, where the Judicial Committee declared that the pawnee's special interest creates no right in property in favour of the pawnee, and that it gives him no more than a right such as a lienholder possesses, but with this added incident, that he can sell the property of his own motion and without any assistance from the court.

9 *Howes v Ball* (1827) 7 B & C 481. As to what amounts to delivery see PARA 13 ante.

10 Story on Bailments (9th Edn) (1878) s 292.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/23. Pawnee's right to possession.

23. Pawnee's right to possession.

Where goods are pawned¹, the pawnee has the right to their possession and, until the money for which the pledge is a security is tendered or paid, is the only person who can sue in conversion². A claim by the pawnee to be the absolute owner of the goods pawned does not excuse the pawnor from the necessity of tendering the amount due, and does not revert in him the right to the immediate possession of the goods without payment or tender of the amount due³.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Gledstane v Hewitt* (1831) 1 Cr & J 565; *Owen v Knight* (1837) 4 Bing NC 54; *Martin v Reid* (1862) 11 CBNS 730; *Broadbent v Varley* (1862) 12 CBNS 214; *Mecklenburgh v Gloyne* (1865) 13 WR 291. As to the right of action in conversion see PARA 21 note 2 ante; and as to the pawnee's right of action see PARA 30 post.

3 *Yungmann v Briesemann* (1892) 67 LT 642, CA; and see PARA 21 ante. However, the bailee of goods who has a lien on them and who sets up a claim for a sum other than that which is due, or sets up a claim inconsistent with the right of the owner, loses his lien and his detention becomes unlawful, and the owner of the goods can sue without tendering or paying the amount due: *Dirks v Richards* (1842) Car & M 626; *Yungmann v Briesemann* supra. See also PARA 4 ante; and LIEN vol 68 (2008) PARA 851.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/24. Assignment of pawnee's rights.

24. Assignment of pawnee's rights.

A pawnee's¹ special property or special interest in the pledge² may be assigned to a third person by way of assignment of the pawnee's interest or of a sub-pledge by him³. Such a transfer is not inconsistent with the contract of pawn so long as it purports to transfer no more than the pawnee's interest against the pawnor, the pawnee in the meantime being responsible for due care being taken for the safe custody of the property⁴. At the same time the pawnor may in such a case recover damages if the property is damaged in the hands of the third person, or if he is prejudiced by any delay in the delivery of the property to him after tender of his debt⁵.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 As to the special property or special interest see PARA 22 ante.

3 *Donald v Suckling* (1866) LR 1 QB 585; *Halliday v Holgate* (1868) LR 3 Exch 299, Ex Ch. See also *Mores v Conham* (1610) Owen 123; and MORTGAGE vol 77 (2010) PARA 257.

4 *Donald v Suckling* (1866) LR 1 QB 585 at 615-616 per Blackburn J; and see *Nicholson v Hooper* (1838) 4 My & Cr 179. As to the pawnee's duty of care see PARA 25 post.

5 *Donald v Suckling* (1866) LR 1 QB 585 at 618 per Cockburn CJ.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/25. Pawnee's duty of care.

25. Pawnee's duty of care.

The common law requires nothing extraordinary of a pawnee¹, but only that he use ordinary care for restoring the pledge². Thus, if he loses the goods pawned without default on his part he may still recover the debt, and the loss falls on the owner. However, if the pawnee keeps the goods pawned after tender of the debt and they are stolen, he is liable, for after tender he keeps them at his own risk³.

1 For the meanings of 'pawn', 'pledge' and 'pawnee' see PARA 1 ante.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 917; *Syred v Carruthers* (1858) EB & E 469 (accidental fire); but cf *Foley v O'Hara* (1920) 54 ILT 167. As to the principles of liability for negligence generally see NEGLIGENCE. As to the general principles applicable to bailments see BAILMENT vol 3(1) (2005 Reissue) PARA 15.

3 *Anon* (1693) 2 Salk 522.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/26. Pawnee's right to use the pledge.

26. Pawnee's right to use the pledge.

A pawnee¹ may not use the pledge if it would be the worse for such use, but if this is not so he may make a reasonable use of it at his own risk². If he is put to expense in his custody, he may take a reasonable profit from the property to recompense him³. If, to preserve the pledge, reasonable use is necessary, the pawnee must exercise that use, and if the use of the property is beneficial to it, it seems that the pawnee can use it⁴. The pawnee is responsible for the conduct of his employee to whom he entrusts the pledge and is liable for any loss or damage as a result of his or his employee's misuse of the goods⁵.

1 For the meanings of 'pawnee' and 'pledge' see PARA 1 ante.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 916-917 per Holt CJ; *Anon* (1693) 2 Salk 522 (eg clothes would be the worse for use; not so jewels, which would be used at the pawnee's risk; a horse may be ridden or a cow milked). See also *Cooke v Haddon* (1862) 3 F & F 229, where the consumption by the pawnee of part of some wine pledged to him was held to forfeit his rights in it. As to the usual rules for a bailment see BAILMENT vol 3(1) (2005 Reissue) PARA 18.

3 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 917 per Holt CJ.

4 Story on Bailments (9th Edn) (1878) ss 329-330; and see Paton's Bailment in the Common Law 369-370.

5 Palmer *Bailment* (2nd Edn, 1991).

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/27. Power of sale.

27. Power of sale.

The contract of pawn¹ carries with it an implication that the security may be made available to satisfy the obligation². Under this implication a pawnee has a power of sale on default of payment if the time for payment has been fixed³. If there is no stipulated time for payment, the pawnee may demand payment, and in default of payment may sell, on notice to the pawnor of his intention to do so⁴. The pawnor retains his right to redeem at any moment up to sale⁵, that is at any moment up to the time of the exercise by the pawnee of his power of sale by entering into a valid contract of sale⁶.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Pothonier and Hodgson v Dawson* (1816) Holt NP 383; *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690, CA; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA, per Cotton LJ. As to the statutory power of sale under the Consumer Credit Act 1974 see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 216.

3 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 235, CA, per Fry LJ. The right of a pawnbroker to deal with a pledge is not affected by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951: see s 2(2) proviso (iii); and ARMED FORCES vol 2(2) (Reissue) PARA 81. As to the exercise of the power of sale see PARA 28 post.

4 *Martin v Reid* (1862) 11 CBNS 730; *Pigot v Cubley* (1864) 15 CBNS 701; *France v Clark* (1883) 22 ChD 830 (citing with approval Story on Bailments (9th Edn) (1878) s 308; and distinguishing *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273; *Burdick v Sewell* (1883) 10 QBD 363 at 367).

5 *France v Clark* (1883) 22 ChD 830 (affd (1884) 26 ChD 257, CA); *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA, per Cotton LJ. As to the right to redeem see PARA 19 ante; and as the pawnor's remedy against the pawnee in case of an illegal sale see PARA 21 ante. In the case of pledges regulated by statute, the pawnor's right to redeem at any moment up to sale is specifically reserved: see the Consumer Credit Act 1974 s 116(3); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 212.

6 *The Ningchow* [1916] P 221 at 224 per Sir Samuel Evans P.

UPDATE

27-28 Power of sale, Exercise of the power of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/28. Exercise of the power of sale.

28. Exercise of the power of sale.

If a pawnee¹ sells the pledge he does so by virtue and to the extent of the pawnor's ownership, and not with a new title of his own². The right of sale is exercisable by virtue of an implied authority from the pawnor and for the benefit of both parties³. The pawnee must appropriate the proceeds of the sale to the pawnor's debt, for the money resulting from the sale is the pawnor's money to be so applied. The pawnee must account to the pawnor for any surplus after paying the debt⁴ and is liable in equity and as a fiduciary to pay interest on those monies⁵.

He must take care that the sale is a provident sale, and if the goods pawned are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made⁶.

If sale by the pawnee of the pledge does not realise the amount of his debt, the pawnee can sue for the deficit⁷.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 At common law, a sale by a pawnbroker pawnee did not carry with it any warranty as to the title of goods sold: *Morley v Attenborough* (1849) 3 Exch 500 (cited with approval in *Sims v Marryat* (1851) 17 QB 281 at 290). This is now abrogated by the Sale of Goods Act 1979 s 12 (as amended), which implies terms as to title into all contracts of sale: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 69.

3 *The Odessa* [1916] 1 AC 145 at 159, PC. As to the statutory provisions under the Consumer Credit Act 1974 relating to realisation of pawns see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 216-217.

4 See *ibid* s 121(3); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 217.

5 *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455. As to the principle governing the rate of interest see *Burdick v Garrick* (1870) 5 Ch App 233 at 241 per Lord Hatherley (applied in *Wallersteiner v Moir* [1974] 3 All ER 217, [1974] 1 WLR 991; *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849).

6 As to the pawnee's specific obligations pursuant to the Consumer Credit Act 1974 regarding the value to be realised see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 217.

7 This arises in consequence of the loan contract made between the pawnor and the pawnee, the pledge being no more than security for the repayment of such loan. See *ibid* s 121(4); and PARA 29 post.

UPDATE

27-28 Power of sale, Exercise of the power of sale

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/29. Pawnee's right of action for debt.

29. Pawnee's right of action for debt.

A pawnee¹ has a right of action for his debt notwithstanding the possession by him of the pledge² subject to the rights of the pawnor³. Where the pledge is of a perishable nature and no time for redemption has been fixed, the right of action remains, notwithstanding that the pledge perishes, and the pawnor has no remedy⁴. If by his own default the pawnee is unable to return the security against payment of the debt the pawnor has a good defence to the action⁵.

1 For the meanings of 'pawnee', 'pawnor' and 'pledge' see PARA 1 ante.

2 *Anon* (1701) 12 Mod Rep 564 per Holt CJ; *South-Sea Co v Duncomb* (1731) 2 Stra 919; *Lawton v Newland* (1817) 2 Stark 72.

3 As to the pawnor's rights see PARA 19 et seq ante.

4 *Sir John Ratcliff v Davis* (1610) Yelv 178.

5 *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489 at 493, HL, per Lord Sumner, where, however, the order in the special circumstances of the case was to set off the money value of the shares pledged against the debt. As to the position where the goods pledged have been lost without the default of the pawnee see PARA 25 ante.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/30. Pawnee's right of action for possession.

30. Pawnee's right of action for possession.

Where a pawnee¹ is wrongfully deprived of possession of the pledge he may maintain an action, and the measure of damages is the full value of the thing taken and not merely the amount for which it stands security². He may maintain such an action without joining the pawnor as a party³.

1 For the meanings of 'pawnee', 'pawnor' and 'pledge' see PARA 1 ante.

2 *Swire v Leach* (1865) 18 CBNS 479. See also DAMAGES vol 12(1) (Reissue) PARAS 860, 867. The pawnee is under a duty to account to the pawnor for the excess of any damages recovered over the amount secured: *Swire v Leach* supra. Compare this measure with the limitations referred to in PARA 38 note 4 post. As to the nature of the pawnee's interest see PARA 22 ante; and as to his sole right to sue see PARA 23 ante.

3 *Saville v Tankred* (1748) 1 Ves Sen 101. As to the tort of conversion generally see PARA 21 note 2 ante.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/ (4) RIGHTS, DUTIES AND REMEDIES OF PAWNEE/31. No right of foreclosure.

31. No right of foreclosure.

A pawnee¹ has no right of foreclosure since he never had the absolute ownership at law, and his equitable rights cannot exceed his special property or special interest², the contract of pawn differing in this respect from that of mortgage³.

1 For the meanings of 'pawnee' and 'pawn' see PARA 1 ante.

2 *Carter v Wake* (1877) 4 ChD 605 at 606 per Jessel MR; *Fraser v Byas* (1895) 11 TLR 481. As to the special property or special interest see PARA 22 ante.

3 See *Lockwood v Ewer (or Lady Child v Chanstilet)* (1742) 9 Mod Rep 275; and PARA 3 ante. As to mortgage generally see MORTGAGE vol 77 (2010) PARA 101 et seq.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/32. Execution against goods pawned.

(5) INTERVENING RIGHTS OF THIRD PERSONS

32. Execution against goods pawned.

Where judgment has been obtained against a pawnor¹ of goods and execution has issued on it, the sheriff may not seize the goods pawned unless he satisfies the pawnee's claim².

If execution issues against a pawnee the sheriff may seize goods in pawn in the pawnee's possession, but may sell only those in respect of which the period for redemption has expired³. With respect to the rest he has a right to possess the qualified or special interest of the pawnee⁴, to sell when the time for redemption has expired, or to receive any money paid for its redemption⁵.

1 For the meanings of 'pawn', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Legg v Evans* (1840) 6 M & W 36; *Rogers v Kennay* (1846) 9 QB 592; and see CIVIL PROCEDURE vol 12 (2009) PARAS 1322, 1346. As to sheriffs and their powers see SHERIFFS.

3 *Re Rollason, Rollason v Rollason, Halse's Claim* (1887) 34 ChD 495. As to the period of redemption of agreements within the Consumer Credit Act 1974 see PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 212. See also CIVIL PROCEDURE vol 12 (2009) PARAS 1322, 1346.

4 As to the special interest of the pawnee see PARA 22 ante.

5 *Re Rollason, Rollason v Rollason, Halse's Claim* (1887) 34 ChD 495.

UPDATE

32 Execution against goods pawned

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/33. Distress.

33. Distress.

Goods pawned with a pawnbroker are not liable to distress; but the privilege does not, apparently, extend to goods pawned with a person who is not a pawnbroker¹.

1 *Swire v Leach* (1865) 18 CBNS 479. It should be noted that in this case the pawnee was a pawnbroker by trade, and his position was compared to that of a wharfinger or warehouse-keeper. As to goods which may, or may not, be distrained, and as to the measure of damages in cases of wrongful distress, see DISTRESS. Since the repeal of the Pawnbrokers Acts 1897 to 1960 there is no longer a statutory definition of 'pawnbroker'.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/34. Bankruptcy of a pawnor or pawnee.

34. Bankruptcy of a pawnor or pawnee.

The bankruptcy of a pawnor or a pawnee¹ vests the bankrupt's estate in the trustee of a bankrupt's estate immediately upon his appointment taking effect, or in the case of the official receiver, on his becoming trustee². Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee it so vests without any conveyance, assignment or transfer³.

Where a person is adjudged bankrupt, any disposition of property made by that person during the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting of the bankrupt's estate in a trustee is void except to the extent that it is or was made with the consent of the court, or was subsequently ratified by the court⁴.

After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy has a remedy against the property or person of the bankrupt in respect of the debt, nor may any such person, before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose⁵. This does not affect the right of a secured creditor⁶ of the bankrupt to enforce his security⁷. On the bankruptcy of the pawnor, the pawnee is a secured creditor in the bankruptcy with respect to goods pawned before the date of the bankruptcy order⁸.

Where any goods of an undischarged bankrupt are held by any person by way of pledge, pawn or other security, the official receiver may, after giving notice in writing of his intention to do so, inspect the goods⁹. Where such notice is given to any person, that person is not entitled, without leave of the court, to realise his security unless he has given the trustee of the bankrupt's estate a reasonable opportunity of inspecting the goods and of exercising the bankrupt's right of redemption¹⁰.

Where the pawnor becomes insolvent, a pawnee has priority over the holder of a floating charge where the pledge was granted before the charge had crystallised¹¹.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 See the Insolvency Act 1986 s 306(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 381. The doctrine of marshalling (see EQUITY vol 16(2) (Reissue) PARA 758) has been applied by analogy where brokers pledge a client's securities with their own to a bank to secure an overdraft: see *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393.

3 See the Insolvency Act 1986 s 306(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 381.

4 See *ibid* s 284(1), (3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 205.

5 See *ibid* s 285(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 206.

6 A debt is secured to the extent that the person to whom the debt is owed holds any security for the debt (whether a mortgage, charge, lien or other security) over any property of the person by whom the debt is owed: see *ibid* s 383(2), (3), (4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 548.

7 See *ibid* s 285(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 206.

8 As to secured creditors generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 548 et seq.

- 9 See the Insolvency Act 1986 s 285(5); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 206.
- 10 See *ibid* s 285(5); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 206.
- 11 As to floating charges generally see COMPANIES vol 15 (2009) PARA 1269 et seq.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/35. Rights of the true owner.

35. Rights of the true owner.

The general rule is that, in order to make a pawn¹ valid against the owner of the goods pawned, it must be shown that the pawnor has authority to pawn². To this general rule there are exceptions where the person in possession has a title defeasible on account of fraud³; where the owner of the goods by his conduct is estopped from denying the apparent authority of the pawnor⁴; where the transaction is protected by the provisions relating to mercantile agents and sellers and purchasers of goods in possession of the goods or documents of title to them⁵; and where title to or property in the goods has passed to the pawnee pursuant to statute⁶.

- 1 For the meanings of 'pawn', 'pawnee' and 'pawnor' see PARA 1 ante.
- 2 *Cole v North Western Bank* (1875) LR 10 CP 354 at 362-363, Ex Ch, per Blackburn J. As to actions by the true owner see PARA 38 post.
- 3 See PARAS 36-37 post.
- 4 See PARA 12 ante.
- 5 See PARAS 10-12 ante.
- 6 See PARA 41 post; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 215.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/36. Stolen goods.

36. Stolen goods.

Where goods have been stolen or obtained by fraud¹ the property in the goods remains in the owner². If the stolen goods are pawned³, the owner may maintain an action for their recovery⁴.

- 1 As to theft see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 282 et seq; and as to fraud see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 309 et seq.
- 2 As to the position regarding the implied passing of title by virtue of the Sale of Goods Act 1979 see s 23; para 37 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 154.
- 3 For the meaning of 'pawn' see PARA 1 ante.
- 4 *Leicester & Co v Cherryman* [1907] 2 KB 101, DC; and see *Singer Manufacturing Co v Clark* (1879) 5 Ex D 37.

UPDATE

36-37 Stolen goods, Goods obtained by misrepresentation

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/37. Goods obtained by misrepresentation.

37. Goods obtained by misrepresentation.

Where goods have been obtained under a contract by which the owner voluntarily parts with the possession of the goods and either intends to pass the property or intends to confer a power to pass the property in the goods, the fact that the contract was induced by means of misrepresentation¹ renders the contract voidable only and not void². If before the contract is avoided the goods are pawned³, the pawnee who takes the goods in good faith without notice of the misrepresentation obtains a good title to them⁴. The burden of proof that the pawnee took the goods with notice or otherwise than in good faith lies on the owner⁵.

1 The cases cited in notes 2-5 infra were all decided in the context of fraudulent misrepresentation, but the same principles would seem to be applicable in the case of an innocent misrepresentation: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 762.

2 The contract may be a contract for the outright sale of the goods to the person who obtains them (see *Phillips v Brooks Ltd* [1919] 2 KB 243); or it may be a contract for 'sale or return' or 'sale on appro' (see *Kirkham v Attenborough* [1897] 1 QB 201, CA; *London Jewellers Ltd v Attenborough* [1934] 2 KB 206, CA); or it may be a contract between the owner and an agent for sale (see *Folkes v King* [1923] 1 KB 282, CA). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 155. As to the voidability of contracts induced by misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 783. As to voidable contracts see CONTRACT vol 9(1) (Reissue) PARA 607.

3 For the meanings of 'pawn' and 'pawnee' see PARA 1 ante.

4 *Higsons v Burton* (1857) 26 LJ Ex 342; *Attenborough v St Katharine's Dock Co* (1878) 3 CPD 450, CA; *Phillips v Brooks Ltd* [1919] 2 KB 243. See also the Sale of Goods Act 1979 s 23; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 154.

5 *Whitehorn Bros v Davison* [1911] 1 KB 463, CA. See also *Jameson v Union Bank of Scotland* (1913) 109 LT 850.

UPDATE

36-37 Stolen goods, Goods obtained by misrepresentation

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/38. Actions by the true owner.

38. Actions by the true owner.

Where goods have been wrongly pawned¹, the true owner may maintain an action for conversion against the pawnor, and is generally entitled to recover by way of damages the value of the goods converted². He may also maintain an action against the pawnee, since receipt of goods by way of a pledge is conversion if the delivery of the goods is conversion³. In such a case the measure of damages is the value of the goods converted, but as an alternative to an order for damages the court may order delivery up of the goods concerned⁴.

1 For the meanings of 'pawn', 'pledge', 'pawnee' and 'pawnor' see PARA 1 ante.

2 *Parker v Godin* (1728) 2 Stra 813. As to conversion, and for the normal measure of damages, see PARA 21 note 2 ante.

3 See the Torts (Interference with Goods) Act 1977 s 11(2). This provision abrogated the former rule at common law to the contrary (see *Miller v Dell* [1891] 1 QB 468, CA) and brings pawns and pledges into line with the normal rule in sale of goods cases (see eg *Hollins v Fowler* (1875) LR 7 HL 757). See further TORT vol 45(2) (Reissue) PARAS 555, 572.

4 As to remedies generally see PARA 21 note 2 ante. Where goods have been pawned by a bailee (eg a hirer under a hire purchase agreement) and the pawnee acquired his special interest in the pawn before the determination of the bailment, the measure of damages is not the full value of the goods, but the value of the claimant's interest in them: *Belsize Motor Supply Co v Cox* [1914] 1 KB 244; and see BAILMENT vol 3(1) (2005 Reissue) PARA 86.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/39. Property in the possession of the police.

39. Property in the possession of the police.

Any magistrates' court may direct the delivery of property of any kind which has come into the possession of the police in connection with investigation of a suspected offence to the person who appears to the court to be the owner of it, on the application of the person claiming it or of the police¹.

1 See the Police (Property) Act 1897 s 1(1) (amended by the Theft Act 1968 s 33(3), Sch 3 Pt III; the Criminal Justice Act 1972 s 58; the Consumer Credit Act 1974 s 192(3)(b), Sch 5 Pt 1; the Statute Law (Repeals) Act 1989; and the Police (Property) Act 1997 s 4(1)); and POLICE vol 36(1) (2007 Reissue) PARA 520. The Police (Property) Act 1897 does not apply to Northern Ireland: see the Police (Northern Ireland) Act 1998 s 74(3), Sch 6.

UPDATE

39 Property in the possession of the police

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/1. PAWNS AT COMMON LAW/(5) INTERVENING RIGHTS OF THIRD PERSONS/40. Interpleader.

40. Interpleader.

Where adverse claims to pawned property are made against a pawnee¹, he may perhaps have a right to interplead, notwithstanding his interest in the debt for which the property has been pledged².

1 For the meanings of 'pawn', 'pledge' and 'pawnee' see PARA 1 ante.

2 There is no reported case on this point, but see CPR Sch 1 RSC Ord 17; and CIVIL PROCEDURE vol 12 (2009) PARA 1585 et seq. See also *De Rothschild Frères v Morrison, Kekewich & Co, Banque de Paris et des Pays Bas v Morrison, Banque de France v Morrison* (1890) 24 QBD 750, CA (wharfinger interpleading even though having a claim for payment of charges); *Best v Hayes* (1863) 1 H & C 718 (auctioneer claiming commission); *Attenborough v St Katharine's Dock Co* (1878) 3 CPD 450, CA.

Halsbury's Laws of England/PLEDGES AND PAWNS (VOLUME 36(1) (2007 REISSUE))/2. CONSUMER CREDIT LEGISLATION IN RELATION TO PAWNS/41. Statutory regulation of pledges and pawns under the Consumer Credit Act 1974.

2. CONSUMER CREDIT LEGISLATION IN RELATION TO PAWNS

41. Statutory regulation of pledges and pawns under the Consumer Credit Act 1974.

Pawnbroking was formerly regulated by the Pawnbrokers Acts 1872 and 1960. The Consumer Credit Act 1974 repealed those Acts¹ and provided a new code for pawnbroking². Articles taken in pawn³ under a regulated consumer credit agreement⁴ are subject to the relevant provisions of the Consumer Credit Act 1974⁵ unless exempt. In practice, most contracts of pawn fall within the statutory control⁶. However, the provisions do not apply to a pledge of documents of title or of bearer bonds⁷, or a non-commercial agreement⁸.

Apart from making various special provisions relating to pledges⁹, the Consumer Credit Act 1974 makes provisions concerning the seeking of business¹⁰, the formalities of entry into credit agreements¹¹, various matters arising during the currency of agreements¹², cancellation¹³, determination¹⁴, and the re-opening of unfair relationships¹⁵. The Act also deals with other types of securities¹⁶.

A licence issued by the Office of Fair Trading is required in order to carry on consumer credit business¹⁷, and it is an offence to engage in any activity for which a licence is required without one¹⁸. Generally, a pawnee engaging in consumer credit business will require a licence under these provisions¹⁹.

In relation to contracts of pawn which are subject to the Consumer Credit Act 1974, pawn records must be kept²⁰. The Act further makes provision for pawn-receipts²¹, the various offences that may arise under a contract of pawn²², the redemption period and procedure for redemption²³, the failure to redeem²⁴, and the realisation of pawns²⁵.

1 See the Consumer Credit Act 1974 s 192(3)(b), Sch 5; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 7.

2 See *ibid* ss 114-121 (ss 114, 118-120 all as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208 et seq.

- 3 For the meaning of 'pawn' for the purposes of the Consumer Credit Act 1974 see s 189(1) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208. As to the meanings of 'pledge', 'pawnor' and 'pawnee' see also s 189(1) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208.
- 4 As to regulated agreements see *ibid* s 8(3) (prospectively amended), s 189(1) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 79. As to consumer credit agreements see ss 8, 189(1) (both as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81. Under the Consumer Credit Act 1974, the distinctions between pawnbrokers, moneylenders and other providers of credit are no longer relevant, the old pawn agreement being now one species of the credit transaction and coming within the definition of a regulated agreement.
- 5 See note 2 *supra*.
- 6 The financial limit of the statutory control is for credit not exceeding £25,000: see the Consumer Credit Act 1974 s 8(2) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81. As from a day to be appointed, this limit is abolished so that all agreements will be subject to regulation unless specifically exempted: see the Consumer Credit Act 2006 s 2(1)(b) (not yet in force). At the date at which this volume states the law no such day had been appointed.
- 7 See the Consumer Credit Act 1974 s 114(3)(a) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208.
- 8 See *ibid* s 114(3)(b); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 208.
- 9 See note 2 *supra*.
- 10 See the Consumer Credit Act 1974 Pt IV (ss 43-54) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 143 *et seq*.
- 11 See *ibid* Pt V (ss 55-74) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 157 *et seq*.
- 12 See *ibid* Pt VI (ss 75-86) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 234 *et seq*.
- 13 See *ibid* ss 67-73 (ss 69, 70 as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 183 *et seq*.
- 14 See *ibid* ss 87-103 (ss 88, 101 as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 251 *et seq*.
- 15 See *ibid* ss 140A-140D (all as added); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 269-270.
- 16 See *ibid* Pt VIII (ss 105-126) (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 200 *et seq*.
- 17 See *ibid* s 21 (prospectively amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 121. For the meanings of 'consumer credit business' and 'business' see s 189(1), (2) (s 189(1) as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 81.
- 18 See *ibid* s 39(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 121. As to licensing generally see CONSUMER CREDIT vol 9(1) (Reissue) PARA 119 *et seq*.
- 19 See *ibid* s 21(1) (prospectively amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 121.
- 20 See *ibid* s 26 (as substituted); the Consumer Credit (Conduct of Business) (Pawn Records) Regulations 1983, SI 1983/1565; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 209.
- 21 See the Consumer Credit Act 1974 ss 114, 118 (both as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 210, 214.
- 22 See *ibid* ss 114(2), 115, 119(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 210, 218.
- 23 See *ibid* ss 116, 117; and CONSUMER CREDIT vol 9(1) (Reissue) PARAS 212-213.
- 24 See *ibid* s 120 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 215.
- 25 See *ibid* s 121; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 216.

UPDATE

41 Statutory regulation of pledges and pawns under the Consumer Credit Act 1974

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.